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SUPREME COURT, U.S.

No. 07-849

IN THE

Supreme Court of the United States

JULIE E. COLLINS and ROBERT B. RYAN,

Petitioners,

v.

D.R. HORTON, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

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TABLE OF CONTENTS

Page

TABLE OF CITED AUTHORITIES ii

ARGUMENT

I. THE QUESTION PRESENTED WAS OFTEN AND CLEARLY RAISED BELOW. 1

A. The Issue Was Raised Multiple Times in the District Court. 1

B. The Question Was Raised, Argued, and Decided in the Ninth Circuit. .. 3

II. THERE IS A WELL-DEFINED SPLIT AMONG THE CIRCUITS ON THE QUESTION PRESENTED. 6

A. DRH Fails to Reconcile Obvious Differences Among Circuits. 6

B. *Howsam* Cannot Be Expanded To Cover The Question Presented Here. 11

C. Collins And Ryan Are Not Required To Show That The Outcome Would Be Different. 12

CONCLUSION 13

TABLE OF CITED AUTHORITIES

Page

Cases

Chiron Corp. v. Ortho Diagnostic Sys., Inc.,
207 F.3d 1126 (9th Cir. 2000) 5, 6

Howsam v. Dean Witter Reynolds,
537 U.S. 79 (2002) 7, 11, 12

In re Y & A Sec. Litig.,
38 F.3d 380 (8th Cir. 1994) 10

John Hancock Mut. Life In. Co. v. Olick,
151 F.3d 132 (3d Cir. 1998) 8

John Morrell & Co v. Local Union 304A, UFCW,
913 F.2d 544 (8th Cir. 1990) 10, 11

Johnson v. California,
545 U.S. 162 (2005) 9

Klay v. United Healthgroup, Inc.,
376 F.3d 1092 (2004) 12

Miller Brewing Co. v. Fort Worth Distrib. Co.,
781 F.2d 494 (5th Cir. 1986) 9

Montana v. United States,
440 U.S. 147 (1979) 8

Cited Authorities

	Page
Nelson v. Adams USA, Inc., 529 U.S. 460 (2000)	1
Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979)	8, 12
PGA Tour, Inc. v. Martin, 532 U.S. 661 (2001)	1
Riggins v. Nevada, 504 U.S. 127 (1992)	12
Sherrock Brothers, Inc. v. DaimlerChrysler Motors Co., 2008 WL 63300 (3d Cir. 2008)	8
Steris Corp. v. Int'l Union, 489 F. Supp. 2d 501 (W.D. Pa. 2007)	8
Tel. Workers Union v. N.J. Bell Tel. Co., 584 F.2d 31 (3d Cir. 1978)	7, 8
United States v. Estate of Romani, 523 U.S. 517 (1998)	10
Statutes	
9 U.S.C. § 9	9

ARGUMENT

I. THE QUESTION PRESENTED WAS OFTEN AND CLEARLY RAISED BELOW.

DRH devotes more than a third of its Brief in Opposition to asserting that Collins and Ryan failed to contend, in both the district court and in the Ninth Circuit, that a court has ultimate responsibility, not limited by the "manifest disregard" standard, for determining the preclusive effect of a court judgment on a later arbitration. Before the district court and the Ninth Circuit, however, Collins and Ryan presented the issue raised by their petition in such a manner that "the lower court [was] fairly put on notice as to the substance of the issue." *Nelson v. Adams USA, Inc.*, 529 U.S. 460, 469 (2000); *see PGA Tour, Inc. v. Martin*, 532 U.S. 661, 676-78 n.27 (2001) (petitioner's question of ADA Title III coverage not precluded for failure to make the exact same argument below, since the coverage issue had generally been raised in the lower courts).

A. The Issue Was Raised Multiple Times in the District Court.

Collins and Ryan raised this issue both times it was before the district court, and the district court rejected Collins and Ryan's position. Before the arbitration, they argued to the district court that "this Court, not an arbitrator, should decide both the merits of the fraud claims themselves and the issue of collateral estoppel."

ER.220, at 2. The district court stated the issue, and its view, as follows:

> This Court must decide a matter of first impression in the Ninth Circuit: whether the collateral estoppel effect of a court-rendered judgment is to be determined by a court in a subsequent action, or by arbitrators. Plaintiffs assert that because a Federal District Court Judge rendered this Judgment, only a Federal Court may decide its collateral estoppel effects. The Court rejects this argument.

ER.228, at 7; *see also id.* at 13.

After the arbitrators refused to apply collateral estoppel, Collins and Ryan again raised the issue before the district court in their motion to vacate that part of the arbitrators' award. CR.229. The court had already allowed the arbitrators to decide the collateral estoppel issue in the first instance. Therefore, citing many of the cases later cited in the petition, Collins and Ryan urged the court to exercise "'plenary review'" and "determine the collateral estoppel effect of the *Hickcox* judgment on Plaintiffs' identical claims, and to enter judgment in Plaintiffs' favor." *Id.* at 7-8 (quotation omitted). The district court chose not to do so. Rather, it applied the usual deferential standard for *arbitrable* issues and held that the arbitrators' ruling, though erroneous, was not reversible as manifest disregard for the law. Pet. App. at 51a, 56a.

B. The Question Was Raised, Argued, and Decided in the Ninth Circuit.

DRH also argues that Collins and Ryan failed to raise the "court or arbitrator" issue in the Ninth Circuit, and it points to the "Issue Presented" section of their opening brief and other selected portions of the record. Br. Opp'n at 5-7. DRH fails to look in the right place.

In their opening brief to the Ninth Circuit, Collins and Ryan cited nearly all of the authorities later presented in their petition, again contending that courts have the "plenary" authority to determine the preclusive effect of prior judgments. They noted, "Indeed, numerous courts, expressing concern that arbitrators may decline to apply preclusion doctrines, have recognized the authority of courts to make the *ultimate determination* of whether such doctrines apply." Opening Br. at 2, 4, 11, 13, 28-29 (emphasis added).

In their reply brief, Collins and Ryan continued to argue forcefully that even though "the district court committed the issue of collateral estoppel to the arbitrators *in the first instance*," it was nevertheless "[t]he *non-delegable duty* of the federal court to preserve the effectiveness of its own prior judgment." Reply Br. at 1 (second emphasis added). Collins and Ryan devoted fully two pages to their argument that the courts must have the final say in whether their own decisions would have preclusive effect on future cases:

> The need for federal courts to review arbitral decisions on the collateral estoppel effect of prior federal court judgments is

> implicit in the existing debate over *when* in the process the courts should intervene. Some courts hold that the district court should determine the preclusive effect of its own prior judgment *before* the case is submitted to arbitration, while others hold that the arbitrators should be allowed to address the issue in the *first* instance. Nevertheless, there is a general agreement that *courts* should make the *final* determination as to the preclusive effect of a prior court judgment.

Id. at 23 (footnotes omitted).

During oral argument before the Ninth Circuit, Collins and Ryan's counsel again raised the courts' plenary authority to determine the preclusive effect of a prior judgment, free of the manifest disregard standard:

> Because it's collateral estoppel and other circuits have said that it is up to the courts, not arbitrators, ultimately to decide the collateral estoppel effect of prior federal court judgments. That is for the court to decide, not the arbitrators. And even where one lets the arbitrators take a first shot at it, if they make a mistake, whether it's manifest disregard, or simple error, the court should correct that. And numerous circuits have said that it is not ultimately an arbitrator issue, it's a court issue.

Counsel pressed this argument:

> But we think [that manifest disregard is] not the proper standard. The proper standard whether it's an issue of first impression in the circuit or not, is . . . whether you even apply the manifest disregard standard to collateral estoppel. We urge the court not to do that because this is a fundamental right, a fundamental precept.

The panel reflected its consideration of this issue when it asked DRH's attorney, "Can you respond to Mr. Cooper's argument that manifest disregard is not the standard of review here?" DRH's counsel replied that "this circuit, in my opinion, has made it clear that [manifest disregard] is the standard."

The Ninth Circuit then squarely decided the issue. It held that (i) "arbitrators are entitled to determine in the first instance whether the prerequisites for collateral estoppel are satisfied," Pet. App. at 17a (quotation omitted); (ii) that they "possess the same broad discretion possessed by district courts to determine when to apply offensive non-mutual collateral estoppel," *id.*; and (iii) that the arbitrators' decision would be review deferentially for manifest disregard, not on a plenary basis, *id.* at 21a.

That this was a considered ruling, however erroneous, is clear because the opinion in this case was really a sequel to the Ninth Circuit's 2000 opinion in *Chiron Corp. v. Ortho Diagnostic System, Inc.*, 207 F.3d 1126, 1134 (9th Cir. 2000). In *Chiron*, the court held that

an arbitrator could determine the preclusive effect of another arbitrator's prior ruling. After reviewing the rulings by other circuits – including many of the cases cited in the petition – it specifically reserved whether an arbitrator could also make that determination when the prior ruling issued from a court. The court acknowledged "the presumption that the court issuing the original decision is best equipped to determine . . . what is or is not precluded by that decision." *Id.* In this case, the Ninth Circuit answered that reserved question by backing away from the "presumption." The court could not have expressed its view on "court versus arbitrator" in any clearer way. The issue is squarely presented for this Court.

II. THERE IS A WELL-DEFINED SPLIT AMONG THE CIRCUITS ON THE QUESTION PRESENTED.

A. DRH Fails to Reconcile Obvious Differences Among Circuits.

DRH argues that there is no split among the circuits on whether a court or an arbitrator should determine the preclusive effect of a prior court judgment. Br. Opp'n at 9. Challenging Collins and Ryan's statement that, in contrast to the Ninth Circuit, the Third, Fifth and Eighth Circuits have held that "courts' consideration of preclusion issues is plenary, not limited by the usual manifest disregard standard," Pet. at 14, DRH contends that those circuits are "far from holding that an arbitrator can never decide the issue of collateral estoppel," Br. Opp'n at 10. DRH further argues that Collins and Ryan overlook the difference between

res judicata and collateral estoppel. *Id.* at 12-13. Finally, DRH maintains that this Court's decision in *Howsam v. Dean Witter Reynolds*, 537 U.S. 79 (2002), resolved any alleged split among the circuits on the question presented. Br. Opp'n at 14-15.

First, Collins and Ryan have *not* argued that an arbitrator can "never decide" the preclusive effect of a prior court judgment in the first instance. Rather, it has always been their position that the court must exercise its plenary authority to be the *ultimate* decision maker on this issue, if and when called upon, either before or after arbitration. Pet. at 1, 14. In many instances, the arbitration will take place before a court ever looks at the case. The Third Circuit recognized that possibility in *Telephone Workers Union v. New Jersey Bell Telephone Co.*, 584 F.2d 31 (3d Cir. 1978), one of the cases in conflict with the Ninth Circuit's ruling:

> When a federal court is presented with the contention that a prior federal judgment determined issues now sought to be relitigated in an arbitral forum it must first determine the effect of the judgment. This is so whether the question arises in an action to compel arbitration, or, as here, in an action to enforce a disputed award.

Id. at 33 (internal citations omitted). DRH contends that *Telephone Workers* is somehow irrelevant because it is a thirty-year old case and was decided on a motion to enforce arbitration rather than a motion to compel.

Br. Opp'n at 10. However, *Telephone Workers* has not been overruled, and it is still good law in the Third Circuit.[1]

DRH also argues that the Third Circuit's opinion in *John Hancock Mut. Life In. Co. v. Olick*, 151 F.3d 132 (3d Cir. 1998), does not reflect a conflict with the Ninth Circuit because the preclusive effect of a prior court decision on an arbitration was being reviewed under the doctrine of res judicata rather than collateral estoppel. Br. Opp'n at 10. But these are sister doctrines[2] and, in recognizing a conflict among circuits as to whether the existence of a prior judgment would require the district

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[1] DRH tries to cast doubt on the continued validity of *Telephone Workers* by citing the Third Circuit's recent unpublished decision in *Sherrock Brothers, Inc. v. DaimlerChrysler Motors Co.*, 2008 WL 63300 (3d Cir. 2008). Br. Opp'n at 11. But *Sherrock Brothers* is clearly off target: the arbitration panel decided the effect of a prior decision of a state board, not a prior court judgment as DRH claims. In addition, the court in *Sherrock Brothers* found that the arbitrator had applied correct legal principles and did not opine on what the result would have been had the arbitrators ruled incorrectly. DRH also cites *Steris Corp. v. International Union*, 489 F. Supp. 2d 501 (W.D. Pa. 2007), but that case concerned the preclusive effect of a prior *arbitration* decision. Br. Opp'n at 11.

[2] "[C]ollateral estoppel, like the related doctrine of res judicata, has the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 (1979). "Application of both doctrines is central to the purpose for which civil courts have been established, the conclusive resolution of disputes within their jurisdiction." *Montana v. United States*, 440 U.S. 147, 153 (1979).

court to enjoin a subsequent arbitration, the Third Circuit cited cases dealing with both res judicata and collateral estoppel. 151 F.3d at 137-38. Here, the application of collateral estoppel would have had the same effect as res judicata, because it would have disposed of the entire claim, not just an issue.

DRH also argues that the Fifth Circuit case cited by Collins and Ryan, *Miller Brewing Co. v. Fort Worth Distributing Co.*, 781 F.2d 494 (5th Cir. 1986), does not demonstrate a split among the circuits on federal law because it deals with Texas law. Br. Opp'n at 11. However, while the Fifth Circuit did look at Texas law in *Miller Brewing*, it also addressed the issue under the Federal Arbitration Act, holding:

> The Arbitration Act contemplates that awards made pursuant to arbitration will be confirmed in the federal courts. 9 U.S.C. § 9. Since an arbitration award involves the entry of judgment by a court, parties should be barred from seeking relief from arbitration panels when, under the doctrine of res judicata, they would be barred from seeking relief in the courts.

781 F.2d at 499. Thus, DRH's argument that this case has no bearing on a division among the circuits and state courts[3] on federal law is without merit.

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[3] *See also Johnson v. California*, 545 U.S. 162, 164 (2005) (granting certiorari to settle conflict between California Supreme Court and Ninth Circuit regarding application of federal law); (Cont'd)

Lastly, DRH attacks Petitioners' reliance on the Eighth Circuit to evidence a circuit split. DRH argues that the holding of *In re Y & A Securities Litigation*, 38 F.3d 380 (8th Cir. 1994) – that courts have the "power to defend their judgments as res judicata" – was limited to a consent decree. Br. Opp'n at 12. However, DRH's use of the term "consent decree" exceeds poetic license because, in actuality, the court used only the term "consent judgment," indicating that it was treating the ruling below like any other judgment. Furthermore, the majority broadly stated that, "[n]o matter what, courts have the power to defend their judgments as *res judicata*, including the power to enjoin or stay subsequent arbitrations." 38 F.3d at 382. The court explained that "[t]he district court, and not the arbitration panel, is the best interpreter of its own judgment." *Id.* at 383. DRH points out that a concurring judge expressed his own belief in the "limited" scope of the opinion, but DRH unfairly omitted the judge's next statement: "I would be most reluctant to say that a court cannot enforce its own pre-existing injunctive order, notwithstanding subsequent invocation of the arbitration process by one of the parties to the case that resulted in the injunction." *Id.* at 384-85.

DRH next argues that *John Morrell & Co v. Local Union 304A, UFCW*, 913 F.2d 544 (8th Cir. 1990), is not in conflict with the Ninth Circuit because it held that

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(Cont'd)
United States v. Estate of Romani, 523 U.S. 517, 521 (1998) (granting certiorari to settle conflict between Pennsylvania Supreme Court and federal court of appeals regarding interpretation of federal statute).

arbitrators can decide *in the first instance* whether a prior court judgment has preclusive effect. Br. Opp'n at 12. Actually, in their petition, Collins and Ryan cited *John Morrell* for the *same* proposition. Pet. at 14. Significantly, in *John Morrell*, the Eighth Circuit approved the district court's exercise of its plenary power to *overturn* the arbitrators' erroneous application of collateral estoppel – a power that the Ninth Circuit refused to recognize in the present case. The Eighth Circuit never mentioned the term "manifest disregard of the law" in ruling that "the arbitrator was barred from reconsidering the issue decided in the prior judicial proceeding." 913 F.2d at 562. Thus, *John Morrell* clearly conflicts with the Ninth Circuit's dependency on the manifest disregard standard.

B. *Howsam* Cannot Be Expanded To Cover The Question Presented Here.

DRH argues that this Court's decision in *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002), is dispositive because "courts have relied on [*Howsam*] to hold that arbitrators can decide preclusion issues." Br. Opp'n at 14. DRH misconstrues and overplays the Court's holding in *Howsam*, where the Court decided that NASD arbitrators should interpret and apply a NASD rule. 537 U.S. at 81. But the Court's reasoning actually supports Collins and Ryan's position: NASD arbitrators are "more expert about the meaning of their own rule [and] are comparatively better able to interpret and to apply it." *Id.* at 80. This Court concluded: "And for the law to assume an expectation that aligns (1) decisionmaker with (2) comparative expertise will help better to secure a fair and expeditious resolution of

the underlying controversy-a goal of arbitration systems and judicial system alike." *Id.* By this reasoning, a court should have the final authority to determine the collateral estoppel effect of its own judgment, regardless of whether one defines collateral estoppel as procedural or substantive.[4]

C. Collins And Ryan Are Not Required To Show That The Outcome Would Be Different.

DRH argues against granting review because it believes that Collins and Ryan cannot show that the outcome would be any different if they received the relief requested. Br. Opp'n at 18. DRH has not cited any authority for this dubious proposition. *See Riggins v. Nevada*, 504 U.S. 127, 137 (1992) (defendant not required to show that outcome would have been different absent the error, only the possibility that the defense was impaired by the error). Certainly the outcome would be different on the specific issue decided by the arbitrators, i.e., whether the pending appeal deprived the *Hickcox* judgment of preclusive effect. Indeed, there is a strong likelihood that Collins and Ryan *would* prevail on collateral estoppel as a whole. The arbitrators themselves conceded that the argument for collateral estoppel "might be compelling if this were an appealable proceeding in a court of law." ER.229, Ex. G, at 1. Moreover, DRH has not shown that any of the factors specified in *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979), for rejecting offensive non-mutual collateral estoppel apply here.

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[4] DRH relies on an Eleventh Circuit case, *Klay v. United Healthgroup, Inc.*, 376 F.3d 1092 (2004), to support its labored application of *Howsam*. But Collins and Ryan cited *Klay* as consistent with the Ninth Circuit, but not other circuits. Pet. at 13.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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